

⁵ The parties agree that, adding in the specified prejudgment interest, the total amount of the damages award is currently over \$4 million. *See, e.g.*, Motion at 2,19; APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP, Opposition to Motion to Stay Damages Order, File No. EB-03-MD-011 (filed May 2, 2007) (“Opposition to Stay”) at 7, 9, 52.

within 90 days of the *Damages Order*'s release on February 23, 2007.⁶ On April 12, 2007, Network petitioned for review of the *Damages Order* in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").⁷ On April 20, 2007, Network filed the instant Motion seeking a stay of the *Damages Order* pending appeal.⁸ On May 2, 2007, APCC opposed the Motion.⁹ As explained below, we agree with APCC that Network has failed to show that (i) Network will suffer imminent irreparable harm in the absence of a stay, or (ii) its appeal is likely to succeed on the merits.

3. **Standard for granting a stay pending appeal:** The parties correctly agree that our consideration of Network's Motion for stay of the *Damages Order* pending appeal may follow the traditional four-pronged test set forth in *Petroleum Jobbers*.¹⁰ Specifically, to prevail on its Motion,

⁶ See, e.g., *Damages Order* at 30, ¶ 68. In June 2003, APCC filed a formal complaint for payphone compensation against Network under Section 208 of the Act. *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Formal Complaint, File No. EB-03-MD-011 (filed June 3, 2003) ("Liability Complaint", which stemmed from two previous informal complaints). APCC chose to "bifurcate" the proceeding into liability and damages phases pursuant to Rule 1.722. See, e.g., Liability Complaint at 1-2; *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Memorandum Opinion and Order, 20 FCC Rcd 2073, 2074 n.6 (Enf. Bur. 2005) ("*Bureau Liability Order*"). In February 2005, the Enforcement Bureau released its *Bureau Liability Order* finding Network liable to APCC for payphone compensation, which Order the Commission affirmed on review in September 2006. *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Memorandum Opinion and Order on Review, 21 FCC Rcd 10488 (2006) ("*Commission Liability Order*"). The following month, Network petitioned for review of the *Commission Liability Order* in the D.C. Circuit. *NetworkIP, LLC v. FCC*, Petition for Review, Case No. 06-1364 (D.C. Cir. filed Oct. 30, 2006) ("*Liability Appeal*"). Meanwhile, shortly after the *Bureau Liability Order*, APCC filed a supplemental damages complaint pursuant to section 208 of the Act and Rule 1.722. *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Supplemental Complaint, File No. EB-03-MD-011 (filed Apr. 4, 2005) ("*Damages Complaint*"). Consequently, Network sought and obtained from the D.C. Circuit an abeyance of Network's *Liability Appeal* pending Commission resolution of APCC's Damages Complaint. *Liability Appeal*, Per Curiam Order (D.C. Cir. Dec. 21, 2006).

⁷ *NetworkIP, LLC v. FCC*, Petition for Review, Case No. 07-1092 (filed Apr. 12, 2007) ("*Damages Appeal*"). On April 23, 2007, APCC sought to intervene, *NetworkIP, LLC v. FCC*, Motion to Intervene, Case No. 07-1092 (filed Apr. 23, 2007), moved to dismiss on jurisdictional grounds, *NetworkIP, LLC v. FCC*, Intervenor's Motion to Dismiss, Case No. 07-1092 (filed Apr. 23, 2007) (attached as Ex. 1 to Opposition to Stay), and moved for expedited briefing and argument, *NetworkIP, LLC v. FCC*, Motion for Expedited Briefing and Argument, Case No. 07-1092 (filed Apr. 23, 2007). On May 7, 2007, the Commission filed, *inter alia*, an Opposition to APCC's Motion to Dismiss. *NetworkIP, LLC v. FCC*, Opposition to Motion to Dismiss, Case No. 07-1092 (filed May 7, 2007).

⁸ On May 14, 2007, Network filed with the D.C. Circuit a Motion to Stay Damages Order. *Damages Appeal*, Motion to Stay (D.C. Cir., filed May 14, 2007 under seal). This Motion to Stay appears to have no additional, relevant information compared to the Motion filed with the Commission on April 20, 2007.

⁹ Opposition to Stay. On May 14, 2007, Network filed a Motion for Leave to File a Reply, and Reply. *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Motion for Leave to File a Reply; Reply, File No. EB-03-MD-011 (filed May 11, 2007). Because the [* * * REDACTED * * *] information Network seeks to provide in its Reply is not germane to the bases of our determination here, see n.16, *infra*, and Network has made no showing of extraordinary circumstances to justify the filing of a reply not contemplated by the rules, we deny that motion. See generally 47 C.F.R. § 1.45(d). We therefore need not address APCC's filings regarding Network's request: *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Opposition to Defendant's Motion for Leave to File a Reply, File No. EB-03-MD-011 (filed May 16, 2007); *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Conditional Motion for Leave to File Opposition to Defendant's Reply (filed May 16, 2007); *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Opposition to Defendant's Reply, File No. EB-03-MD-011 (filed May 16, 2007).

¹⁰ *Virginia Petroleum Jobbers Assoc'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958) ("*Petroleum Jobbers*"). See, e.g., Motion at 16-17; Opposition to Stay at 10-11. APCC also argues that, even if Network were to satisfy the 4-part test, we should still deny Network the equitable relief of a stay, because Network's recent [* * *

(continued....)

Network must demonstrate that: (1) it will imminently suffer irreparable harm in the absence of a stay; (2) its appeal will likely succeed on the merits; (3) a stay will not cause substantial harm to APCC; and (4) the public interest would be served (or would not be disserved) by grant of a stay.¹¹

4. **Imminent irreparable harm:** Network argues that [* * * REDACTED * * *], and that this fully satisfies the “irreparable harm” prong of the *Petroleum Jobbers* test.¹² In response, APCC asserts, *inter alia*, that Network’s allegedly irreparable harm must be “imminent;” and such imminence is absent here because, in APCC’s view, APCC can collect on the *Damages Order*’s monetary award only by filing suit in state or federal court and obtaining a court judgment under section 407 of the Act.¹³ Thus, according to APCC, it will not be able to force Network to pay any of the *Damages Order*’s monetary award for many months, if not years, *i.e.*, only after a full court proceeding under section 407 of the Act.¹⁴

5. We agree with APCC that, under a proper application of the *Petroleum Jobbers* test, Network must show that the allegedly irreparable harm would be imminent in the absence of a stay.¹⁵ We

(...continued from previous page)

REDACTED * * *] renders Network’s hands unclean. *See, e.g.*, Opposition to Stay at 1-10. Given our denial of Network’s Motion on other grounds, we need not and do not reach this argument.

¹¹ *Petroleum Jobbers*, 259 F.2d at 925. *See, e.g.*, *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977) (“*WMTC v. Holiday*”); *In the Matter of 4.9 GHz Band Transferred from Federal Government Use*, Order, 19 FCC Rcd 15270, 15272 at ¶ 5 (2004); *In re Application of Liberty Productions*, Order, 16 FCC Rcd 18966, 18969 at ¶ 14 (2001) (subsequent history omitted); *General Communication, Inc. v. Alaska Communications Systems*, Order, 16 FCC Rcd 8169, 8169 at ¶ 3 (2001) (“*GCI v. ACS*”) (subsequent history omitted); *Expanded Interconnection with Local Telephone Company Facilities*, Order, 8 FCC Rcd 123, 124 at ¶ 6 (1992) (subsequent history omitted); *In the Matter of Regulation of Prepaid Calling Card Services*, Order, DA 07-1504, 2007 WL 952102, 952103 at ¶ 7 (Wireline Comp. Bur., March 29, 2007).

¹² *See, e.g.*, Motion at 18-20.

¹³ *See, e.g.*, Opposition to Stay at 11-13. Section 407 of the Act provides, in pertinent part: “If a carrier does not comply with an order [of the Commission] for the payment of money within the time limit in such order, the complainant . . . may file in the district court . . . or in any State court . . . a petition setting forth briefly the causes for which he claims damages, and the order of the Commission. . . .” 47 U.S.C. § 407.

¹⁴ Opposition to Stay at 3, 5, 11-13, 43-44, 49 n.86. APCC has made the same argument to the D.C. Circuit. Opposition to Stay at Ex. 1.

¹⁵ *See, e.g.*, *In the Matter of Implementation of Section 309(j) of the Communications Act*, Order, 1999 WL 446589, 446592 at ¶ 10 (FCC 1999) (“To justify a stay, the alleged harm must be great, imminent, and certain to occur”) (subsequent history omitted); *Cellularvision of New York, L.P. v. Sportschannel Associates*, Order, 10 FCC Rcd 13192, 13192 at ¶ 4 (1995) (subsequent history omitted); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6741 at ¶ 88 (1994) (subsequent history omitted); *Federal-State Joint Board on Universal Service*, Order, 20 FCC Rcd 5167, 5168-69 at ¶ 4 (Wireline Comp. Bur. 2005) (“In order to demonstrate irreparable harm, the harm must be certain and immediate.”) (subsequent history omitted); *Improving Public Safety Communications in the 800 MHz Band*, Order, 21 FCC Rcd 678, 682 at ¶ 12 (Pub. Safety and Crit. Info. Div. 2006) (“party seeking a stay must show that ‘the injury complained of [is] of such imminence that there is a ‘clear and present’ need for equitable relief to prevent irreparable harm’”) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) and cases cited therein) (subsequent history omitted). *See also Drex Israel v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1992) (citing *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2nd Cir. 1989) (“‘irreparable harm’ must be ‘neither remote nor speculative, but actual and imminent’”); *ECRI v. McGraw-Hill Inc.*, 809 F.2d 223, 226 (3rd Cir. 1987) (“plaintiff has the burden of proving a clear showing of immediate irreparable injury”); *Wisconsin Gas Co. v. FERC*, 756 F.2d at 674 (internal citations omitted) (“[T]he injury must be both certain and great; it must be actual and not theoretical . . . [and] the party seeking injunctive relief must show that ‘[t]he injury complained of [is] of such imminence that there is a ‘clear and present’ need for equitable relief to prevent irreparable harm’”) (emphasis in original).

also conclude that, given APCC's view that it cannot collect on the *Damages Order*'s monetary award unless and until it has obtained a court judgment under section 407 of the Act, Network's allegedly irreparable harm is too remote and speculative to satisfy the *Petroleum Jobbers* test.¹⁶

6. **Likelihood of prevailing on the merits:** Network argues that the *Commission Liability Order* and the *Damages Order* contain numerous fatal flaws, and thus Network is likely to prevail on the merits of its court appeals.¹⁷ Most, if not all, of these arguments have already been fully addressed and decided in the Commission's *Orders*, and, after further careful consideration, we conclude that the Motion does not raise any basis – new or repeated – for believing that Network has a substantial likelihood of obtaining reversal or vacatur of any of the Commission's decisions in those *Orders*. Thus, Network fails to satisfy this prong of the 4-part *Petroleum Jobbers* test, as well.¹⁸

7. One new Network argument merits mention, however. Network asserts that the Commission's focus on who was the "last" facilities-based carrier was unlawful because the Commission had never previously announced a "last-switch" rule for liability.¹⁹ But neither Network nor APCC had presented that argument to either the Bureau or the Commission; rather, the parties stipulated that the question presented in this case was which carrier was the last "facilities-based" carrier in the call chain. APCC argued that Network was the last "facilities-based" carrier; Network argued that its debit-card-provider customers were the last "facilities-based" carriers.²⁰ Both parties agreed that either Network or its debit-card-provider customers were liable, and neither party ever suggested that some other entity either "upstream" or "downstream" in the call chain might be liable. The Commission's decision that Network was the last facilities-based carrier in the call chain turned only on the meaning of "facilities-based," and the Commission's assessment of that issue had nothing to do with its assessment of who was "last." Thus, Network cannot justify a stay on the basis of this argument, which has little likelihood of success on appeal.

8. Given Network's failure to satisfy the "irreparable harm" and "likelihood of success"

¹⁶ Given this conclusion, we need not and do not determine whether Network has shown that, if the *Damages Order*'s monetary award were imminently enforced, Network would [* * * REDACTED * * *]. We also note that Network has not argued that (i) a failure to pay the *Damages Order*'s monetary award prior to the conclusion of a court proceeding under section 407 could or would result in Commission sanctions, or (ii) the possibility or imposition of such sanctions would constitute irreparable harm. Thus, this Order does not address those issues.

¹⁷ Motion at 20-45. For example, Network argues that the Commission misinterpreted its own payphone compensation rules and orders, *id.* at 21-28, failed to indicate clearly which carrier in a call path was obligated to compensate payphone service providers, *id.* at 22-26, did not provide fair notice of how it would apply its rules, *id.* at 29-38, improperly granted APCC a waiver of the statute of limitations, *id.* at 39-42, and applied the wrong prejudgment interest rate, *id.* at 42-46.

¹⁸ We understand that Network does not necessarily have to show a likelihood of success greater than 50%. *See, e.g., WMTC v. Holiday*, 559 F.2d at 844. Network's showing still falls short, especially given the absence of irreparable harm. *See, e.g., id.*

¹⁹ *See, e.g.,* Motion at 23-26, 31-33, 36-38. We note that, because Network did not make this argument in its Application for Review of the *Bureau Liability Order*, *see* Network Application for Review, File No. EB-03-MD-011 (filed March 1, 2005) ("AFR") at 10-18, in its Reply to APCC's Opposition to that AFR, *see* Reply to Opposition to Application for Review, File No. EB-03-MD-011 (filed March 25, 2005) at 1 ("The question in this case is whether NET or its carrier customers are legally responsible for payphone compensation It is the customer, not NET, that is responsible for compensating payphone owners."), or in a petition for reconsideration of the *Commission Liability Order*, it will be barred from doing so in the D.C. Circuit. 47 U.S.C. § 405(a). *See, e.g., Bartholdi Cable Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997).

²⁰ *See, e.g.,* Revised Joint Statement, File No. EB-03-MD-011 (filed Oct. 22, 2003). For just one example, the parties stipulated that "this case hinges on whether the Defendants or their Customers ... are liable for payphone compensation as a matter of law under ... applicable precedent." *Id.* at 2.

prongs of the 4-part *Petroleum Jobbers* test, we need not reach the “harm to APCC” and “public interest” prongs.²¹ Accordingly, for the reasons explained above, we conclude that Network has failed to meet its burden of demonstrating its entitlement to the equitable relief of a stay.

9. **Pledge of Security Interests:** Network offers to post security “sufficient to protect APCC,”²² and notes that “it is well within the FCC’s discretion to grant a stay solely on the posting of security aimed at maintaining the status quo, even if less than the full amount of the judgment.”²³ It is true that, on a few occasions, the Commission has, upon the defendant’s pledge to secure the judgment, granted a stay pending appeal, without applying the *Petroleum Jobbers* test.²⁴ In those cases, however, the defendant pledged security (or placed funds in escrow) in the full amount of the judgment. Here, by contrast, Network pledges security [* * * REDACTED * * *].²⁵ Consequently, those cases do not support Network’s Motion for a stay here.

10. Network contends that we should accept its pledge of security of less than the full judgment amount, because federal courts may do so when the defendant convincingly demonstrates that it [* * * REDACTED * * *].²⁶ Assuming, *arguendo*, that the Commission would find federal court decisions useful in this regard, those decisions do not support Network’s position here. The cited court decisions rest on the premise that, absent a stay pending appeal, the plaintiff could execute on the judgment [* * * REDACTED * * *] “at once.”²⁷ Here, by contrast, APCC repeatedly asserts that it cannot execute on the *Damages Order*’s monetary award “at once,” but rather can execute only after filing and successfully prosecuting a collection action in a court under section 407 of the Act, a process that could take many months, if not longer.²⁸ Therefore, as stated above, allowing Network to obtain a stay by pledging security of less than the full judgment amount is not necessary to prevent any imminent [* * * REDACTED * * *].²⁹ In turn, the record does not demonstrate that federal case law supports Network’s request for a stay absent a pledge of security for the full judgment amount.

²¹ See, e.g., *WMTC v. Holiday*, 559 F.2d at 844; *Petroleum Jobbers*, 259 F.2d at 924 (despite demonstrating likelihood it would prevail on the merits, “petitioner’s inadequate showing on the remaining previously enumerated considerations prevents us from granting the stay it has requested.”). See also, *In the Matter of Dynamic Cablevision of Florida*, Order, 10 FCC Rcd 7738, 7745 at ¶ 16 (Cable Serv. Bur. 1995) (“Because Dynamic has not satisfied each prong of the four part test for the granting of stays, we deny its request for stay.”).

²² Motion at 47.

²³ *Id.* at 3. See Motion at 47-49.

²⁴ Motion at 3, 47-49. See, e.g., *GCI v. ACS*, *supra*; *Virgin Islands Telephone Corp. Tariff* FCC No. 1, Order, 7 FCC Rcd 4235, 4236-37 at ¶¶ 13-14 (1992); *Time Warner Entertainment Co.*, Order, 9 FCC Rcd 5815, 1815-16 at ¶¶ 1-5 (Cable Serv. Bur. 1994); *Heritage Cablevision Associates of Dallas, LP v. Texas Utilities Elec. Co.*, Order, 8 FCC Rcd 373, 374 at ¶ 14 (Comm. Carr. Bur. 1993).

²⁵ See, e.g., Motion at 47-49; Opposition to Stay at 8, 45 n.83, 50-52.

²⁶ Motion at 47-50, citing *Miami International Realty Co. v. Paynter*, 807 F.2d 871 (10th Cir. 1986); *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794 (7th Cir. 1986); *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189 (5th Cir. 1979).

²⁷ See, e.g., *Olympia Equipment*, 786 F.2d at 800 (Easterbrook, J., concurring). See also *Alexander v. Chesapeake, Potomac, and Tidewater Brooks, Inc.*, 190 F.R.D. 190, 193-194 (E.D. Va. 1999).

²⁸ See, e.g., Opposition at 3, 5, 11-13, 43-44, 49 n.86. Ex. 1. In its Opposition to Motion to Dismiss in the D.C. Circuit, the Commission argues that section 407 of the Act does not affect Network’s appellate rights under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

²⁹ In light of this determination, and as stated previously, see n.16, *supra*, we take no position regarding the current [* * * REDACTED * * *].

11. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.720-1.736 of the Commission's rules, 47 C.F.R. §1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Network's Motion to Stay the *Damages Order* IS DENIED, and IT IS FURTHER ORDERED that Network's Motion for Leave to File a Reply IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Alexander P. Starr
Chief, Market Disputes Resolution Division
Enforcement Bureau